

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 75-1060

To be argued by  
MICHAEL HARTMERE

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

Docket No. 75-1060

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UNITED STATES OF AMERICA, *Appellee,*

—v.—

RICHARD BARRY, *Appellant.*

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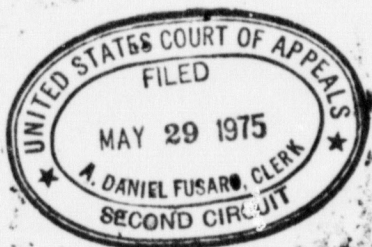
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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**APPENDIX FOR THE APPELLEE**

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THE COURT: Very well.

I will deny the motion to suppress. I can't credit the testimony of the defendant that he made no statement to the authorities during the period shortly after his arrest. It is entirely inconsistent with the proceeding to suppress a statement that might be admitted against him as an admission. Because if there were no admission there would be nothing to suppress.

So he apparently is willing to take both horns of the dilemma -- or unwilling to take either one, I guess is correct.

And I can't distinguish this, or I find it analogous, rather, to a situation where a defendant wants the benefit of a charge that he has been entrapped into committing an offense, while at the same time denies that he committed it. And that, of course, is an inconsistency which results in a ruling that no charge on the issue of entrapment is called for when the defendant denies that he committed the offense.

But primarily the ground for the denial of the motion is the failure of the defendant to persuade the Court that he was denied the assistance of a lawyer at the time when he requested one.

That's the order.

Call the jury.

/a.

1 THE COURT: You have heard the arguments,  
2 the presentation of the evidence in the case is  
3 finished also, and there are some exhibits that  
4 have been introduced - I think statements from  
5 the Daily Reports of one of the agents, Mr.  
6 Sprankle, and also some reports of an analysis  
7 made of two batches of so-called Speed, admittedly  
8 a dangerous drug and one that is regulated by the  
9 Government and subjected to or restricted so far  
10 as its use and distribution is concerned by cer-  
11 tain criminal laws.

12 You have been selected and sworn as jurors  
13 in this case to try the issues of fact which are  
14 raised by the allegations in the indictment which  
15 make certain charges against Mr. Barry and his  
16 denial by reason of his not guilty plea.

17 Of course, it is not only your task and your  
18 duty, but it is your exclusive province to deter-  
19 mine what the facts in the case are and, in making  
20 that determination, to consider and weigh the  
21 evidence.

22 So it is your recollection of the evidence  
23 that controls and not anything that counsel have  
24 said or anything that I may say. So that is your  
25 job. You have to decide where the truth lies and

2a.



1           what happened.

2           The indictment in this case charges that on  
3           or about the 25th day of June, 1973, and continu-  
4           ously thereafter and up to the date of this in-  
5           dictment, which was on November 16th of '73, at  
6           Winsted, Torrington, New Hartford and New Britain,  
7           in the District of Connecticut, Richard Barry and  
8           co-conspirators Russell Albert Thomas, Jr.,  
9           Richard Stanley Windus and two others are named,  
10          Thomas Paul Ohotnicky and Joseph Louis Kocsis,  
11          co-conspirators but not co-defendants, and others  
12          not named, did wilfully and knowingly combine,  
13          conspire, confederate, agree together and with  
14          each other to knowingly and intentionally possess  
15          quantities of amphetamine with intent to distribute  
16          and dispense them, which would be an offense in  
17          violation of the federal laws.

18          Now, that is the indictment and that is the  
19          charge. The function of an indictment, as I told  
20          you before you were actually selected as jurors,  
21          is just a way of getting the case started in court,  
22          bringing it up for trial.

23          So the indictment, itself, is not part of the  
24          evidence, not even in the slightest degree, of the  
25          guilt of the defendant. Because as I told you, the

1 Grand Jury that presents it has listened only to  
2 such witnesses as the Government chose to present  
3 before the Grand Jury. And the prospect of the  
4 defendant was not before the Grand Jury, his wit-  
5 nesses were not there and his counsel was not there.  
6 So you are the first jury which really tries the  
7 defendant. No one else has passed upon his guilt  
8 or innocence.

9 Upon this charge the burden is upon the  
10 Government to prove that the defendant is guilty  
11 beyond a reasonable doubt. And you must find that  
12 in order to find that he is guilty, that the evi-  
13 dence does establish to your satisfaction that he  
14 is guilty beyond a reasonable doubt.

15 Now, of what? He is charged with the crime  
16 of conspiring with others to violate a certain law  
17 dealing or concerned with amphetamine. Now, the  
18 law that they are charged with conspiring provides  
19 that it shall be unlawful for any person knowingly  
20 and intentionally to manufacture, distribute a  
21 controlled substance or to possess a controlled  
22 substance with intent to distribute it.

23 The elements of that crime are that there is  
24 the distribution of the controlled substance. We  
25 will call it Speed; it is amphetamine and it is a



1 controlled substance, we know that. Knowingly and  
2 intentionally.

3 Now, those are the elements of the crime of  
4 intentionally distributing. But this is not the  
5 crime that the Government is charging here.

6 The Government charges only that Barry con-  
7 spired with certain others and agreed to commit  
8 that crime. So whether it was committed or not  
9 isn't important, really. It is only important  
10 that one step was taken by one of those who were  
11 in the conspiracy to commit the crime.

12 There is evidence, of course, that such a  
13 crime was committed. You have had ample evidence  
14 that there was a distribution of Speed. The evi-  
15 dence that bears upon conspiracy I will discuss  
16 in a minute. But, first let me tell you what  
17 conspiracy is in the eyes of the criminal law.

18 Ask yourself why should anybody be convicted  
19 as a criminal for agreeing with someone to commit  
20 a crime if the crime isn't committed. That doesn't  
21 have to be, either, in order to find a defendant  
22 guilty of conspiracy.

23 One step has to be taken in aid of an agree-  
24 ment to commit such a crime. The reason for that  
25 is that if several people get together and decide

Ja.



1 they are going to do something against the law,  
2 that in itself is a thing that ought to be stopped  
3 and ought to be made punishable.

4 If you take one step, just one step, an inno-  
5 cent step it might be in itself. Because if there  
6 is a group of people who get together to commit a  
7 crime there is more likelihood that such a crime  
8 would be successful and be more widespread and be  
9 more dangerous than if one person decided to commit  
10 a crime.

11 At any rate, it is a crime if there was a  
12 conspiracy here. And it would be one for which Mr.  
13 Barry would be responsible, if you find beyond a  
14 reasonable doubt that he was a part of the con-  
15 spiracy.

16 Now the conspiracy itself is charged to have  
17 been one to distribute amphetamine. Now that  
18 doesn't mean that every member has to go out and  
19 pass out amphetamine and distribute it.

20 But the evidence shows - there is evidence to  
21 show, anyway, and apparently not disputed, that  
22 this fellow Russell Thomas was buying, obtaining  
23 amphetamine from someone and was distributing it.  
24 And I think he said that at one time he was making  
25 as much as \$1200 a week in that business of dis-

1           tributing dangerous drugs.

2           If you find that he was obtaining amphetamine  
3           in such quantities from Mr. Barry, that in itself  
4           would justify finding that there was an agreement.

5           Now, what is necessary for the Government to  
6           prove in order to establish that there was an  
7           agreement which constitutes a criminal conspiracy?

8           It is alleged that the defendant Barry con-  
9           spired with other persons - and I've told you who  
10          they are, this is in the indictment which you will  
11          have - he conspired with others to commit this  
12          offense of distribution or possession with intent  
13          to distribute even of a dangerous drug, to wit:  
14          In this case, amphetamine.

15          Now, I've told you being a part of a con-  
16          spiracy and participating in it is a different  
17          thing from actually committing the act of distribu-  
18          tion. It is highlighted in this case, that differ-  
19          ence, because the Government has not charged Mr.  
20          Barry directly with distributing, and they have  
21          not charged him directly with possession with  
22          intent to distribute.

23          Those are separate crimes. They haven't  
24          charged him with that. They charged him with  
25          being part of a conspiracy with others to have



1           that crime committed.

2           So even if he was guilty of that, it doesn't  
3 necessarily mean that he was part of a conspiracy,  
4 even if he was distributing. I mean one individual  
5 can commit a crime, but that doesn't mean that he  
6 is part of a conspiracy. Had someone from that  
7 location been selling, that doesn't mean it was  
8 part of a conspiracy.

9           But the Government argues that this repeated  
10 delivery of large quantities which could only be  
11 intended for resale established that there was  
12 some kind of an agreement that this was part of a  
13 chain of distribution and, therefore, there had to  
14 be some arrangement between or among certain ones,  
15 including Mr. Barry.

16           All right? You don't have to answer that.

17           In order to establish the offense of conspiracy  
18 the evidence offered by the Government must show  
19 beyond a reasonable doubt, one, that the conspiracy  
20 described in the indictment was formed and existing  
21 at or about the time alleged. And the time alleged  
22 is from the 25th of June of '73 thereafter up until  
23 this indictment was brought in, which was in Novem-  
24 ber of '73.

25           And that the conspirators in this case,

8a.

1 particularly the Government says Barry, Thomas and  
2 Windus at the very least whom they brought here,  
3 in full knowledge as to what the objects of the  
4 conspiracy were, to distribute Speed for money and  
5 with the intention of achieving those objects  
6 wilfully became members of the conspiracy. That  
7 is the second thing the Government would have to  
8 prove.

9 Third, that one of the defendants, and not  
10 necessarily Mr. Barry, thereafter knowingly com-  
11 mitted at least one of the overt acts charged.

12 One of the overt acts is the actual distribu-  
13 tion. Another is the actual possession. A third  
14 would be going to get it. The fourth would be  
15 paying for it.

16 But they have to prove at least one of these  
17 being done in order to make this conspiracy illegal,  
18 if there was a conspiracy.

19 And that that act was performed in furtherance  
20 of some object or purpose of the conspiracy as  
21 charged.

22 Now, the first element to be considered is  
23 whether there was a conspiracy at about this time,  
24 as alleged. Now, conspiracy is a combination of  
25 two or more - two or more - persons by concerted



1 action -- I'm putting somebody to sleep out there  
2 and I guess it's my voice and it's possibly the  
3 subject matter of what I'm talking about. But I'll  
4 try not to be any duller than the subject requires,  
5 or any longer than the law requires in order to  
6 explain this to you.

7 So it's getting kind of warm in here and  
8 maybe getting a little stuffy, but let's all fight  
9 it and see if we can't force our way through to  
10 conclude our business here.

11 Was there a conspiracy formed and existing at  
12 about this time? Now, a conspiracy is sometimes  
13 called a partnership in crime. More accurately,  
14 it is a partnership in a criminal purpose, a part-  
15 nership to get something done that is criminal.

16 If two or more persons do formally agree, or  
17 informally, to commit a crime, then any act done  
18 by one of them is - in furtherance of the conspiracy  
19 and before its termination, if it is reasonably  
20 related to carrying out the crime - is sufficient  
21 to support a charge under this statute. And if  
22 one of them does it, then all those who are members  
23 of the conspiracy are liable or responsible.

24 So I don't have to tell you that you wouldn't  
25 expect to find, as you don't in this case, that

1 there is an agreement in writing. You have to  
2 judge from their conduct whether there was an  
3 agreement between them to distribute or to possess  
4 amphetamine.

5 So it doesn't have to be a formal agreement  
6 when I say an "agreement". They just have to show  
7 that in some way they were working together or had  
8 agreed on what they would do; that is, carry out  
9 a criminal project.

10 On the other hand, the mere fact that they  
11 were together at times and associated with each  
12 other and discussed common things doesn't neces-  
13 sarily establish proof of the existence of a  
14 conspiracy.

15 Now the defendant, Mr. Barry, says I knew  
16 Thomas, a friend of mine. He came to my house  
17 often, we talked about fishing.

18 I don't know whether he said they had a beer  
19 or two now and then. Anyway, he brought his car,  
20 he brought his wife's car down to my place to  
21 have it fixed. I knew him for a long time. He  
22 bought parts from me.

23 So I say the mere fact that they were together  
24 and talked things over about their common aims  
25 doesn't necessarily establish proof of the existence

11a.



1 of a conspiracy. It has to be proof that they  
2 were agreeing to do something that was against  
3 the law, something different from going fishing  
4 or buying a few parts needed to repair a Volkswagon  
5 or a Corvette.

6 The evidence must establish beyond a reason-  
7 able doubt that one or more of the means or methods  
8 described was used in an effort to effect or accom-  
9 plish some object or purpose of the conspiracy.  
10 And that is not disputed.

11 It is not disputed here that there was plenty  
12 of action, plenty of activity and plenty of trans-  
13 actions of sizable nature in Speed.

14 This case is being brought down to the issue  
15 of whether or not Mr. Barry actually had anything  
16 to do with it. He says no, he doesn't know any-  
17 thing about Speed, he didn't have anything to do  
18 with it, these things never happened so far as he  
19 is concerned and, therefore, how could he be a  
20 member of a conspiracy if these other fellows were  
21 in it. He wasn't.

22 That is where the issue really comes down to.  
23 So before you find that the defendant, or any  
24 other person, has become a member of the conspiracy,  
25 the evidence must persuade you beyond a reasonable

12a.

1 doubt that the conspiracy was formed and that the  
2 defendant, in this case Mr. Barry, who is claimed  
3 to have been a member, knowingly and wilfully  
4 participated in the unlawful plan with the intent  
5 to advance or further some object or purpose of  
6 the conspiracy.

7 For a man to be held for joining others in a  
8 conspiracy he must, in some sense, promote the  
9 venture himself and make it his own. The question  
10 is not whether what was done would constitute  
11 promoting it or being an act in furtherance of it.  
12 The question is whether Mr. Barry is the man who  
13 did it in this particular case.

14 If you should find beyond a reasonable doubt,  
15 from the evidence in this case, that a conspiracy  
16 existed as charged in this indictment and that the  
17 defendant was a part of that conspiracy and that  
18 during the conspiracy some act was done in further-  
19 ance of it, knowingly, by any one of them, then  
20 proof of the conspiracy offense charged is com-  
21 plete.

22 Now, the Government says we don't have any  
23 moving pictures of this amphetamine, this Speed,  
24 being passed from Mr. Barry to Mr. Thomas. We've  
25 got Mr. Thomas who says so.



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1           They also say that this is not just one simple  
2 transaction. They say remember, on three separate  
3 occasions - the first time Windus, who lives in  
4 Winsted or Torrington; Thomas, who lived in New  
5 Hartford; and Albano, the agent, got together and  
6 they arranged for Albano, who was going to be the  
7 buyer here, the undercover man, they said we're  
8 going to meet at the cutoff or the exit from I-84,  
9 an express highway, at the Farmington, New Britain  
10 town line, and that's a place Kelsey and East  
11 Street. Not once, but twice and three times these  
12 three got together from different places and came  
13 to meet there.

14           And then that Thomas alone went down the  
15 street -- took Windus part way with him, but left  
16 him in the car and then Thomas went to where  
17 Thomas says he did and came back, and on two of  
18 these occasions he brought back with him substan-  
19 tial amounts of amphetamine.

20           They say, well, we don't have anybody but Mr.  
21 Thomas who saw Mr. Barry. But they ask you to find  
22 from this kind of a transaction set up in this way  
23 that Mr. Barry was the connection.

24           But if substantial quantities of amphetamine  
25 were obtained in that same area, that same neighbor-

1 hood, and that same building, that someone in that  
2 building was the man furnishing the Speed. And  
3 they say we have a Government agent who saw Mr.  
4 Thomas go in there on these occasions, or at least  
5 one of them, and come back. And we followed him  
6 and then the transfer took place. So we ask you  
7 from all that to say this is additional support  
8 for the testimony of Thomas, that that's where he  
9 got the Speed.

10 The defendant, on the other hand, says: Not  
11 so. He didn't come.

12 I don't know that he said Thomas never came  
13 to his house on these particular occasions. But  
14 he said the occasion when the Government agent,  
15 Sprankle, was supposed to have been watching, he  
16 says it wasn't that day at all. It was the same  
17 green van, but it was a different time and it was  
18 a different day.

19 Well, I'm not going to discuss all these  
20 points with you. But you heard the arguments as  
21 to the significance of the green van.

22 The Government says Thomas came back and he  
23 told Windus, who told Albano the connection is  
24 paranoid, he's all uptight about a van that's  
25 parked across the street from his house. And they



1 say how could he have done that and said that if  
2 it really had meant nothing whatsoever to the con-  
3 nection at the time it happened.

4 And the defendant has said it really didn't  
5 mean very much; it was there, it was on a Sunday,  
6 we were getting ready for a picnic. So there is  
7 a square conflict in there as to what actually  
8 did happen and as to, again, whether or not Mr.  
9 Thomas actually passed that on to Windus, who in  
10 turn passed it on to Albano on the night when the  
11 transaction took place.

12 These present questions of fact that you will  
13 have to determine. You are the judges of the  
14 facts. This is the evidence you've heard. You've  
15 heard the testimony, you've seen the witnesses.

16 This is a criminal case. The consequences  
17 are serious. They are serious for the Government,  
18 they are serious for the defendant. I mean these  
19 are laws that should be enforced and if they are  
20 violated penalties should be imposed. So it is  
21 important both ways.

22 Because it is that important, however, to a  
23 defendant the law is that every person accused of  
24 a crime is presumed to be innocent until proven  
25 guilty beyond a reasonable doubt. That is, you

1 don't go out and guess at it. You don't say:  
2 Well, I think, you know, either way. They have  
3 to prove that he is guilty beyond a reasonable  
4 doubt.

5 That doesn't mean more likely to be true,  
6 but proof that convinces you that he is guilty.  
7 And you start with a presumption that he is inno-  
8 cent.

9 There is some evidence here that was intro-  
10 duced that he committed an offense having to do  
11 with marijuana, which is also a drug, the sale  
12 of which is prohibited, some time ago in California.  
13 Well, that has no bearing on this case at all, the  
14 fact that this may have occurred.

15 The only purpose that was introduced was to  
16 say this is the kind of a man, he has that kind of  
17 a record, so you had better watch and pay very  
18 close attention to his testimony because a man  
19 who has committed that kind of a crime would be  
20 less likely to be telling the truth. It is to  
21 impeach his credibility, not to prove anything in  
22 connection with whether he was part of a conspiracy  
23 here in New Britain in 1973.

24 So he has that presumption and the burden is  
25 on the Government to prove his guilt beyond a



1 reasonable doubt.

2 That doesn't depend on the number of witnesses,  
3 nor on the quantity of the testimony, but on the  
4 nature and quality of the testimony, whether from  
5 the Government's witnesses or from the defendant's,  
6 wherever it comes from.

7 Now, I haven't tried to influence you directly  
8 or indirectly as to any fact in this case, or as to  
9 the truthfulness of any witness, or as to the  
10 action, knowledge or intention of the defendant.  
11 I haven't tried to do that and don't try to gather  
12 from what I say in explaining some of these things  
13 that I am trying to do that. I am trying to  
14 avoid doing that. Because it is not only your job,  
15 but it is your responsibility to make those de-  
16 terminations.

17 So the due enforcement of the law is a  
18 challenge. It is a challenge to our sense of duty  
19 and it makes a strong call upon the jury and upon  
20 the Court in every criminal case.

21 But it must never override the obligation of  
22 another call, which is to make sure that no defend-  
23 ant is found guilty of a crime unless the evidence  
24 points to his guilt with the degree of certainty  
25 which the law requires. You must reach your verdict

1 solely on the basis of the evidence and the in-  
2 structions of the Court.

3 Now, as I have said, the Government has the  
4 burden of proving beyond a reasonable doubt that  
5 Mr. Barry was a member of a conspiracy which  
6 possessed and distributed amphetamine, or the  
7 purpose of which was to do that. Whether he  
8 actually did it or not isn't important.

9 Now, what is a reasonable doubt? A reasonable  
10 doubt is a doubt arising from the evidence or from  
11 the lack of evidence after you have considered it  
12 all.

13 It is a doubt which is based upon reason.  
14 It is not a vague, speculative, imaginary something,  
15 but the kind of a doubt that would cause a reason-  
16 able person to hesitate in the more important  
17 affairs of your life before you take action. So  
18 if you have a doubt which would cause you to hesi-  
19 tate on doing something important, that is a  
20 reasonable doubt. But it isn't just any sort of  
21 a doubt.

22 The Government does not have to prove its  
23 case beyond all doubt. If the evidence justifies  
24 in your judgment the conclusion that the accused  
25 is guilty beyond a reasonable doubt, you should



1 declare him to be guilty.

2 If, on the other hand, you have reasonable  
3 doubt concerning the establishment of any essential  
4 element of the offense, you will find him not  
5 guilty.

6 Now maybe the facts, while not actually show-  
7 ing him handing over amphetamine to Mr. Thomas,  
8 are sufficient to justify you in inferring that  
9 that's what happened. But you can't infer it just  
10 because it may be consistent with guilt. You must  
11 believe from all the evidence and beyond a reason-  
12 able doubt that the facts proved are inconsistent  
13 with his innocence as to that fact.

14 I mean you are in there now to where you are  
15 going to have to make a decision as to who is  
16 telling the truth here. Because there is nothing  
17 left to infer if you believe Mr. Thomas, that he  
18 actually obtained the Speed from Mr. Barry.

19 You see, this is not a case where anybody is  
20 saying that there was somebody else in the house,  
21 somebody else in that apartment. Nobody said that.  
22 It has come down to a point where it is Mr. Barry  
23 or it isn't. So there is a square conflict of  
24 testimony on that point, as far as I can see.  
25 Now, maybe you see some other way in which to

1 approach this case.

2 But if you have a doubt, it has to be a reason-  
3 able doubt. It is only that doubt that will be  
4 entertained by a reasonable person after an impar-  
5 tial and thorough review of all the evidence and  
6 all the facts in the case which have been brought  
7 to your attention. It is a doubt founded on reason.

8 Now, circumstantial evidence can be used to  
9 prove any fact. As I say, if you find the circum-  
10 stantial evidence is there, then you are justified  
11 in inferring the fact.

12 I think I told a jury here the other day that  
13 an instance of circumstantial evidence would be  
14 when Robinson Crusoe went down early one morning  
15 and he found footprints on the beach, and they  
16 weren't his. So he said to himself there's some-  
17 body else here on this island. Well, all he saw  
18 were footprints on the sand. But the question is  
19 wasn't that a reasonable inference to make, even  
20 though he didn't see anybody else.

21 So here it isn't quite that clear. But they  
22 say that Thomas went down the street and he came  
23 back with \$1400 worth of Speed. Or he went down  
24 another time, the same direction, and he came back  
25 with \$800 worth of Speed. And Windus is getting a

2/a.



1 little part of it for his participation, his  
2 getting Thomas to do that. And as far as we know  
3 Thomas was also making money on this transaction.

4 All right. So, as I say, there are circum-  
5 stances here to which several people testified.  
6 So the Government asks you to draw inferences  
7 from this pattern that will support the testimony  
8 of Thomas. So these are questions for you.

9 Also there is a question of credibility of  
10 witnesses. Who are you going to believe, how  
11 much of what they say are you going to believe.

12 Well, I don't have to tell you about that,  
13 really. You saw the witnesses. You know what  
14 their interest is. Some of them work for the  
15 Government. It is their job to try to track down  
16 law violators.

17 Does that give them an interest? Are they  
18 out to obtain a conviction even at the expense  
19 of coming in and telling untruths, or stretching  
20 the truth? Was that so in this case?

21 These are questions you ask yourself. You  
22 looked at them, you heard them, you saw them and  
23 you evaluate what they said. Did it make sense  
24 or didn't it? Was it kind of nutty, something you  
25 don't want to believe?

1           You apply the same kind of test and judgment  
2 in evaluating the credibility of a witness as to  
3 what he said. Not necessarily whether he lied,  
4 but whether he is mistaken, whether he is mixed  
5 up, whether he didn't see it right or hear it right.

6           You apply the same kind of a test you apply  
7 when you are talking among yourselves. You don't  
8 always believe everything you hear, do you, or  
9 everything anybody tells you. You make some kind  
10 of a judgment. Does that sound right? Is he  
11 telling it to me straight?

12           It's the same thing here. Don't leave your  
13 sense of judgment at home just because you are in  
14 a courtroom here. Bring it along with you and  
15 apply it in this case.

16           So the Government, maybe these witnesses have  
17 an interest - Thomas, Windus. They are convicted,  
18 they are awaiting sentence and now they are testi-  
19 fying, particularly Thomas directly testifying  
20 against his friend. And the question is is there  
21 something there that makes him testify this way  
22 untruthfully.

23           The point is made that he hopes to receive  
24 more favorable treatment at the time of sentence  
25 from the Judge because he has come forward and



1 testified.

2 Now, you might well say and think that one  
3 who does come forward to testify, even though he  
4 is awaiting sentence, is trying to curry favor  
5 with the Court. To an extent in such a case there  
6 is some indication that he admits that he was  
7 wrong, he admits that he did it and maybe this is  
8 a helpful thing to get off his chest as far as  
9 rehabilitating him is concerned.

10 On the other hand, you may feel he is just  
11 doing it anyhow and it isn't just because he wants  
12 to get something off his chest; he wants to get  
13 some advantage.

14 Well, these are questions you will have to  
15 answer for yourself because I am not going to tell  
16 you what I'm going to do. I happen to be the  
17 sentencing judge. But the point is this is a fact  
18 you are pointed to as a basis for asking you to  
19 disbelieve him completely, to say this is strictly  
20 a made-up story.

21 You should examine the testimony of an accom-  
22 plice - and that is what he is on his story - with  
23 great scrutiny because there is that element that  
24 might affect his testimony.

25 The defendant has an interest, too. It is

24a.

1 important to him whether you are going to believe  
2 him or not. You have to remember that. If you  
3 don't believe him, then he has considerable to  
4 lose if he is convicted.

5 So he has motive - not he, but a defendant  
6 who testifies for himself has some motive and some  
7 interest in the case. And that's something for  
8 you to look at and evaluate.

9 All right. I did pretty well. I kept most  
10 of you awake.

11 And now you have these exhibits and they will  
12 be brought to you along with a copy of the indict-  
13 ment. I hand that to the Clerk now.

14 I will ask you to retire now and then take a  
15 recess till two o'clock. Do not start your deliber-  
16 ations until the Clerk comes in to you with the  
17 exhibits. I wouldn't advise you even to have any  
18 caucuses to try to decide who the foreman or fore-  
19 lady is going to be.

20 Wait until you get into the jury room and the  
21 exhibits are brought to you. Then elect one of  
22 your number to serve as your chair person and then  
23 commence to deliberate toward reaching a verdict  
24 in this case.

25 Of course, the verdict has to be unanimous.

25a.



1 All twelve must agree upon the verdict.

2 When it is arrived at, then let us know and  
3 we will receive you so that you can deliver it up  
4 in open court.

5 All right. You are going to lunch now for an  
6 hour. No talking about the case, not even among  
7 yourselves.

8 Recess till two o'clock.

9 (Whereupon, the jury was excused.)  
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26.a.

United States Court of Appeals  
FOR THE SECOND CIRCUIT

No. 75-1060

UNITED STATES OF AMERICA

Appellee

v.

RICHARD BARRY

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Richard Thagg, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 43 East 53rd Street  
Brooklyn, N.Y.

That on the 27th day of May, 1975, deponent served the within Brief and Appendix for the Appellee  
upon Richard M. Rittenband, Esq.  
784 Farmington Ave, West Hartford, Connecticut 06119

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

This 27th day of May 1975

*Edward A. Quimby*  
EDWARD A. QUIMBY  
Notary Public, State of New York  
No. 24-3183500  
Qualified in Kings County  
Commission Expires March 30, 1977



